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Nos. 07-1428 & 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, et al.,
Petitioners,

v.

JOHN DESTEFANO, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL URBAN LEAGUE; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND THE EQUAL JUSTICE SOCIETY IN SUPPORT OF RESPONDENTS.

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QUESTIONS PRESENTED

1. Whether Respondents' failure to certify the results of promotional examinations violated the disparate treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether Respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, an employment related test on the basis of race."

3. Whether Respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Respondents' argument that declining to certify the test results did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment. [1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

Established in 1910, the National Urban League is the nation's oldest and largest community-based movement devoted to empowering African

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

Americans to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are over 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than 2 million people nationwide through programs, advocacy, and research. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. The Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through job training, good jobs, homeownership, entrepreneurship and wealth accumulation and promoting and ensuring our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational or cultural.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

Equal Justice Society ("EJS") is a national civil rights organization comprised of lawyers,

scholars, advocates, and citizens that seeks to protect civil rights and promote equal opportunity for all through law and public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Consistent with that mission, EJS has filed and joined *amicus curiae* briefs before this Court to ensure that antidiscrimination law and jurisprudence continue to encourage and adequately provide opportunities to address racial and societal inequities.

SUMMARY OF ARGUMENT

By not adopting the results of a discriminatory promotional examination that demonstrated a gross adverse impact upon the minorities on the list, the Civil Service Board and the City of New Haven (hereinafter referred to as the "City") did not act in a manner which would require strict scrutiny review under the Equal Protection Clause. The City demonstrated a consciousness of the racial make-up of the promotional examination results and attempted to determine the legality of the examination. The City was not attempting to equalize the test scores through a race-based classification. Rather, the City tried to determine whether there was a less discriminatory promotional test to allow all applicants to equally compete for promotion. The Equal Protection Clause was not implicated by this action.

Similarly, the City was correct in refusing to certify the test results in an effort to comply with the requirements of Title VII. The primary objective of Title VII is to achieve equality of employment opportunities. Congress intended compliance with Title VII's objectives to be voluntary, as self-evaluation of employment practices reduces the risk of unnecessary litigation. Therefore, when faced with a test that undisputedly had a disparate impact on protected groups, rather than certifying the results and awaiting a certain lawsuit, the City appropriately undertook the proactive measure of not certifying a discriminatory promotional examination.

The Court has never found that acting with a consciousness of race in a matter that does not grant benefits because of a person's race triggers strict scrutiny nor violates Title VII unless the reason given is a pretext for intentional discrimination. The Court should decline Petitioners' requests to do so now. This country has made great strides in correcting past injustices and discrimination, and trying to provide true equal opportunity for all. Now is not the time to turn back the clock.

ARGUMENT

I. Simply Acting With A Consciousness Of Race–Which Does Not Provide Benefits Nor Disadvantage An Individual Because Of Race–Does Not Trigger Strict Scrutiny, Nor Does It Establish That Race Was An Improper Consideration Under Title VII.

A. The City's Decision To Decline To Certify The Results Of The Promotional Examinations Did Not Establish A Race-Based Classification That Requires Strict Scrutiny.

After the Court sifts through Petitioners' and supporting *amici*'s hollow claims of race-based classification, quotas, and racial balancing, what remains is Petitioners' failed plea for the application of strict scrutiny under the Equal Protection Clause. There is no doubt that the City was conscious that the recently developed promotional examination resulted in a disparate impact. However, consciousness of a disparate impact on a particular race, and taking the time to determine the legality of its application, is a far cry from Petitioners' claim that the City's action constituted a race-based classification triggering strict scrutiny. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see discussion infra* Part I.B. Furthermore, Petitioners' examples of prior race-based classifications that have been invalidated by the Court provide no

authority for applying strict scrutiny in this case.[2]

The Court has consistently held that race-based classifications require strict scrutiny under the Constitution. Examples of actions where the Court found that there were race-based classifications, and on which Petitioners presently rely, include: reserving seats in an entering class based on the race of the applicant, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978); awarding extra points in a college admission process based on the race of the applicant, *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); creating special employment privilege for minorities when compared to treatment of non-minorities in layoff situations, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986); denying students' school transfer requests because of race, *Parents Involved*, 127 S. Ct. at 2738; and setting aside contracts for minority bidders, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

In each of these cases, the Court focused on how minorities were treated differently from non-minorities. *See Bakke*, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."). Thus, a racial classification was explicitly used as the basis for granting an individual request,

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[2] Petitioners and their *amici*, in over 400 pages of briefing, do not cite any Supreme Court or federal appellate cases holding that mere placement on a promotion eligibility list constitutes a race-based classification.

see, e.g., *Adarand*, *Bakke*, and *Parents Involved*, or for bestowing an added benefit, *see, e.g.*, *Gratz* and *Wygant*.

By contrast, an employer's attempt to determine whether there is a less discriminatory promotional test which would apply equally to all in the promotional pool does not confer any benefit or provide any preference based on race. *See* Br. for the United States as Amicus Curiae Supporting Vacatur and Remand, *Ricci v. DeStefano* (Nos. 07-1428 and 08-328) at 22-23. Each firefighter, regardless of race, will be evaluated based on his or her merit alone. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (recognizing the paramount importance of evaluating candidates as "individual[s] and not in a way that makes an applicant's race or ethnicity the defining feature").

There is no evidence in the record that members of a particular race will be given preferential treatment based upon their race on any future examination. *Cf. Wygant*, 476 U.S. at 270-71 (granting preferential protection against layoffs to minorities). Nor does an employer's mere consideration of whether there are less discriminatory ways of administering an examination deny any firefighter a promotional opportunity based on his or her race. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (use of specific minority set-asides prevented competition by non-minority contractors).

Petitioners claim that the decision to determine whether there are less discriminatory

methods of administering the examination is equivalent to race-balancing or a racial quota. *See, e.g.*, Petitioners' Brief on the Merits, at 23-24. Petitioners conspicuously fail to acknowledge that any reconsideration could still result in a promotional list with a comparable racial composition, or one with a similar composition, but which does not fail a legally actionable disproportionate number of minority firefighters. Indeed, the City is not seeking to implement an examination that would result in a certain number of promotions for minority candidates. Rather, the City merely seeks to provide all applicants a fair chance to be considered for promotion.

Additionally, Petitioners assert that "[t]he promotions were due under the city's charter and civil-service rules." Pet'rs' Br. at 23. To the contrary, the City's ranked eligibility list does not entitle[3] Petitioners to a promotion and the City's "rule of three" does not support this premise. *See* New Haven Charter, Article XXX, § 160. The extent of Petitioners' misplaced reliance is clearly illustrated by the plain text of the provision, which

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[3] Petitioners do not assert an entitlement-property interest in their putative promotions. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 17.5(a) (4th ed. 2008) (noting that "the applicable federal, state or local law which governs the dispensation of the benefit must define the [property] interest in such a way that the individual should continue to receive it under the terms of the law"). No source of positive law guarantees these Petitioner firefighters a promotion; thus, they cannot be considered entitled to it under existing precedent. *Cf.* 57 AM. JUR. 2d § 593 ("[n]either a tentative offer of municipal employment . . . constitutes a property interest").

requires a promotion to "be filled from *among* the three individuals with the highest scores on the exam . . . ." *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006) (emphasis added); *see Kelly v. New Haven*, 881 A.2d 978, 984, 993, 997-1001 (Conn. 2005) (quoting New Haven Charter, Article XXX, § 160) (analyzing the history of the "rule of three," and interpreting the relevant provision to mean that "promotions from the eligibility lists must be from among 'those applicants with the three highest scores'").

Assuming that Petitioner Ricci earned the top score on the examination, he is still not guaranteed a promotion. Applying the "rule of three," the City has the discretion to promote the second, then third, then fourth candidates and completely ignore Mr. Ricci. *See, e.g., Kelly*, 881 A.2d at 993-94 (using an identical hypothetical situation involving four candidates to illustrate the proper application of the "rule of three"). The "rule of three" simply requires the City to choose within a pool of three candidates, and a new pool is created after each promotion is made. *See id.*

Under the "rule of three," no single Petitioner is guaranteed a promotion. The District Court recognized this: "Given that there were 7 Captain vacancies . . . at most two Hispanics would be eligible for promotion, as the top 9 scorers included 7 whites and 2 Hispanics." *Ricci*, 554 F. Supp. 2d at 145. Even if the City had certified the promotional lists, it retains discretion under the "rule of three," and thus, Petitioners were not guaranteed promotions.

Finally, Petitioners assert that declining to certify the test results because the promotional list was predominantly white had a disproportionate impact on white candidates and therefore constituted unlawful discrimination. It is undisputed that more non-minority firefighters passed the test than minority firefighters. However, a government action that has a disproportionate impact on one group does not, on its own, automatically trigger strict scrutiny. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). Simply arguing that non-minority firefighters suffer disproportionately because the results were not certified is insufficient to establish a racial classification.

Since Petitioners have not shown that the City's action amounted to a racial classification, this Court should not apply strict scrutiny. The City was not attempting to equalize the test scores through a race-based classification; it merely declined to certify the test results. In doing so, the City treated all the candidates equally.

B. Not All Actions That Involve Race Are Racial Classifications Under The Law.

Courts have recognized the critical difference between race-conscious and race-based actions. Justice Kennedy's concurrence in *Parents Involved*

addressed this issue directly in the educational context:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

Parents Involved, 127 S.Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). *See also Gratz*, 539 U.S. at 297-98 (Souter, J., joined by Ginsburg, J., dissenting) ("there is nothing unconstitutional" about "race conscious" university admission systems that guarantee admission to a fixed percentage of the top graduates from each high school).

Several Justices raised questions during oral argument in *Parents Involved* illustrating the difficulty in drawing the line between permissible race-conscious actions and unconstitutional racial

classifications. *See, e.g.*, Transcript of Oral Argument at 4-7 (Kennedy, J.), 18-19, (Roberts, C.J.), 21-22 (Scalia, J.), 23-24 (Souter, J.), *Parents Involved*, 127 S.Ct. 2738 (No. 05-908). In responding to hypotheticals about whether a school board could make a race-conscious decision when selecting a site for a new school, then Solicitor General Clement recognized that applying strict scrutiny was not proper when "a race-neutral government action [] doesn't classify people directly based on race..." Oral Argument of *Parents Involved* at 19.

Obviously, questions posed during oral argument merely serve as hypothetical scenarios to test the application of a legal theory. However, these questions do highlight the very real and practical difference between race-conscious actions and racial classifications. The Court has applied strict scrutiny when there are racial classifications, but not when there is simply action with consciousness of race. These questions draw attention to the important difference between treating all persons the same while being conscious of race, and basing decisions on race. Classic examples of impermissibly basing decisions on race include the ability to stay employed in *Wygant*, an award of points based upon race in considering university admission as in *Gratz*, or being permitted to attend a school of your choice as in *Parents Involved*. The City's decision not to certify the promotional examination is simply not that kind of race-based classification.

Indeed, in testing to determine promotional eligibility, the employer is creating a pool of applicants qualified to be promoted, much like a

hiring pool. Circuit courts have consistently refused to apply strict scrutiny to race-conscious outreach and recruitment programs that target minorities but do not grant racial preferences to employees. *See, e.g., Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997);[4] *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571, 1583 (11th Cir. 1994); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999), *aff'd* 64 Fed. Appx. 248 (D.C. Cir. 2003) (citing cases from the Seventh, Eighth, Eleventh and D.C. Circuits).[5] In the recruiting context, actions that use public funding to increase the number of minority applicants are not considered race-based actions.[6] *See, e.g., Peightal v. Metro. Dade County*, 26 F.3d 1545, 1558 (11th Cir. 1994) (referring to recruiting

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[4] "An inclusive [minority] recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment . . . The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm." *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997) (internal citations and quotation marks omitted).

[5] *But cf. Safeco Ins. Co. of Am. v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (recognizing that "where 'outreach' requirements operate as a *sub rosa* racial preference—that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors–courts must apply strict scrutiny").

[6] Similarly, in the voting rights context, the Court has found considering race when drawing new electoral district lines does not automatically compel strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 958 (1996).

programs targeting "young minorities and women for firefighting positions" as "race neutral").

It is evident that the City acted to ensure equal opportunity for all qualified firefighters seeking promotion. The City acted in accordance with its legal obligation not to discriminate and explored less discriminatory alternatives in response to stark evidence of a disparate impact. This decision was made using aggregate test data, looking to the total pass-fail rate of the candidates, and responding according to the requirements of Title VII and EEOC Guidelines. *See* Br. for the United States as Amicus Curiae at 9, *Ricci v. DeStefano* (Nos. 07-1428 and 08-328) ("The [EEOC] Guidelines also state that an employer whose examination has an adverse impact should search for alternative selection devices with less adverse impact as part of the test-validation process.") (citing 29 C.F.R. 1607.3(B), 1607.15(B)(9), (C)(6) and (D)(8) (1978)). The City's response to the racial disparate impact of a promotional test did not constitute a racial classification.

Lower courts that have considered this issue have likewise recognized that actions made with a consciousness of race are distinct from race-based actions and do not require the application of strict scrutiny. *See, e.g.*, *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (holding that construing a police entrance examination in an effort to avoid discriminatory effects "does not constitute a racial classification"); *Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981) (promoting an eligible black officer instead of an eligible white officer with

a better test score was not an equal protection violation because discriminatory intent was not shown); *Raso v. Lago*, 135 F.3d 11, 17 (1st Cir. 1998) (endorsing HUD's consideration of race, the demographics of the region, and federal and state law in conditioning the availability of federal funds to a particular housing area based on whether the area's renting policies ensured equal treatment). *But cf. Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 221-23 (2d Cir. 1984).[7]

After properly finding there was no explicit racial classification, the District Court correctly declined to apply strict scrutiny. *See Ricci*, 554 F. Supp. 2d. at 160-62. The Court then focused its analysis on Petitioners' Title VII claim of intentional discrimination. *See id.* at 151-53. As discussed in detail below, the Court found that Petitioners failed to prove that the City acted with an intentionally discriminatory purpose. *Id.* at 161-62.

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[7] The City's facially race-neutral actions must be distinguished from those in *Bushey* because neither minority nor nonminority candidates benefitted from the decision against certification. This is not a situation where "a state agency unilaterally [] decide[d] to use race-based criteria to favor minorities in employment decisions." *Bushey*, 469 U.S. at 1120 (Rehnquist, J. dissenting in denial of certiorari). Instead, the City did not increase minority scores, nor did it engage in racial balancing; it declined to certify a discriminatory examination and did not promote *any* candidates.

II. The Proper Legal Framework Was Applied To Petitioners' Claims By The Lower Courts.

In the absence of evidence directly showing the impermissible consideration of race, the District Court applied the burden-shifting framework of *McDonnell Douglas*, the well-worn standard used to prove intentional discrimination through inferential proof. *Id.* at 151-53 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under *McDonnell Douglas*, a prima facie case attempts to "rule out the most common reasons for adverse job actions," entitling the plaintiff who proves a prima facie case to a presumption that intentional discrimination has taken place. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (citing *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 358 & n.44 (1977)). In order to avoid a directed verdict, the employer must then meet a burden of production by introducing evidence of a legitimate, non-discriminatory reason for its decision. *Id.* at 253-55. Once the employer has met its burden, the presumption of discrimination created by the prima *facie* case "drops from the case,"[8] and the plaintiff must prove that the employer's stated justification was pretextual for discrimination in order to prevail. *Id.* at 255 n.10. This is not a unique finding; trial

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[8] Petitioners and their *amici* mischaracterize the meaning of the prima facie case by stating the District Court found that race was a factor. *See, e.g.*, Pet'rs' Br. at 48. In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978), the Court made it clear that a "prima facie showing is not the equivalent of a factual finding of discrimination").

courts make this determination every day. These claims are often dismissed on summary judgment.[9]

In analyzing the pretext claim, the District Court found Petitioners' argument that there had been past certification of promotional examinations producing a "statistically adverse impact . . . insufficient in itself to show that defendants' concerns about complying with Title VII were pretextual." *Ricci*, 554 F. Supp. 2d at 154. The District Court also determined that the City need not "certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method." *Id.* at 156. Additionally, the Court found that the "[City's] motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent." *Id.* at 160 (footnote omitted). In the end, the District Court concluded that the reasons provided by the City could not be found to be pretext for unlawful race discrimination.[10]

Ultimately, the City declined to certify the list on the basis of legitimate, well-founded concerns

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[9] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444 (2004).

[10] Petitioners' attention to the hardships of several white candidates is at best misplaced and at worse misleading. *See, e.g.*, *Pet'rs' Br.* at 8 n.4 (citing Pet'rs' App. 375a-378a, 392a-398a, 402a-409a, 413a-419a). All candidates, regardless of race, were subjected to the same pressures and stress normally associated with a rigorous examination.

that certification of the test results would violate the City's obligations under Title VII, [11] which in turn, would expose the City to a valid Title VII claim by minority firefighters. Before hiring from a list with a stark disparate impact, the City sought to explore what options were available to avoid liability under Title VII.[12] This process would have included the continued exploration of lesser discriminatory alternatives. That exploration was cut short by Petitioners' insistence that the City had to hire off the list regardless of its racial composition.

The legal test consistently used by courts for proving unlawful discrimination takes into account the very concerns raised by Petitioners. Indeed, *McDonnell Douglas* provides a safeguard against the misuse of race to achieve some pre-conceived notion of racial balancing. The *McDonnell Douglas* framework requires that an employer account for its

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[11] Under Petitioners' view of the law, it seems employers could do nothing, even if the results had been entirely white – "the inexorable zero"–and where concerns existed about the validity of the test. *See Teamsters*, 431 U.S. at 342 n.23 (quotation marks and citation omitted). Yet, in such a situation, employers would be exposed to potential liability under an adverse impact claim, in addition to a class-wide treatment claim under *Teamsters*. *Id.*

[12] As the District Court noted, "it is necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending a test that, under applicable EEOC Guidelines, presumptively had a disparate racial impact." *Ricci*, 554 F. Supp. 2d at 153. Nevertheless, the City did not hastily discard the promotion examination results, but instead conducted extensive hearings and established a thorough evidentiary record on the issue of lesser discriminatory alternatives.

actions by "articulat[ing] some legitimate, nondiscriminatory reason." 411 U.S. at 802. *McDonnell Douglas* also ensures that an employee is "afforded a fair opportunity to show that [the employer's] stated reason for [its action] was in fact pretext." *Id.* at 804. This test is intended to prevent situations in which an employer would merely play with the numbers until it reached a certain preset result or "claim[] 'good faith' . . . to simply leapfrog from racial disparity directly to remedies that discriminate against nonminorities and establish de facto racial quota systems." Pet'rs' Br. at 55. If a fact-finder determined that these were the real reasons that the City refused to certify the test, there could be a finding of intentional discrimination.

The *McDonnell Douglas* analysis provides the vehicle to sort out legitimate motives from illegal motives. *See Burdine*, 450 U.S. at 253 (plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination"); *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977, 986 (1988) ("The plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination."). Here, the District Court simply found that there was insufficient evidence for a fact-finder to reasonably find unlawful discrimination. *Ricci*, 554 F. Supp. 2d at 160.

To be clear, an employer's unfounded fear of disparate impact exposure cannot justify crude

attempts to accomplish racial balancing. Such cases, if proven, should result in liability. Title VII and the Equal Protection Clause prohibit employers from altering test scores to attain a predetermined bottom line. However, that is not the case here. Rather than massaging the numbers behind closed doors, the City undertook a careful and public evaluation of the validity of its testing process and the availability of lesser discriminatory alternatives.

III. Adopting Petitioners' Arguments Would Discourage Voluntary Compliance By Employers, Which Is The Preferred Means Of Achieving The Objectives Of Title VII.

"As the Court observed in *Griggs v. Duke Power Co.*, 401 U.S., at 429-430, the primary objective [of Title VII] was a prophylactic one: 'It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). The Court has "recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII" and that to achieve voluntary compliance employers must "self-examine and self-evaluate their employment practices." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Albemarle Paper*, 422 U.S. at 417-18 (internal citation omitted). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Voluntary compliance is premised on the theory that employers

are best positioned to observe factual circumstances and determine the applicable legal obligations. *See, e.g.*, *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (recognizing that "[t]he value of voluntary compliance is [especially] important when it is a public employer that acts").

Under Title VII, an unlawful employment practice based on disparate impact is established if:

> (i)t is demonstrated that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) [an alternative employment practice is available.]

42 U.S.C. 2000e-2(k). Consistent with the Congressional intent underlying Title VII and sound public policy, employers must be afforded an opportunity to "self-examine and self-evaluate" a testing process that causes a disparate impact. *Local 93*, 478 U.S. at 515. This opportunity allows employers to assess the availability of an alternative employment practice to determine whether a test is lawful under Title VII and whether voluntary compliance is necessary.[13] That is exactly what the

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[13] If an employer misuses this opportunity to mask a discriminatory intent, a fact-finder could readily infer intentional discrimination. In these cases, employers would be subject to not only lost wages, but also to compensatory and

City did in this case in an effort to comply with the dictates of Title VII.

The goals of Title VII are frustrated when employers are subject to claims prior to determining a comprehensive understanding of what voluntary compliance means. Prematurely allowing claims discourages voluntary compliance by employers. "This result would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (internal citations omitted).

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possible punitive damages. *See* 42 U.S.C. § 1981a(a)(1) (allowing compensatory and punitive damages "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964"). As compensatory and punitive damages are not available for disparate impact claims, employers have little incentive to abuse the opportunity to comply with the mandates of Title VII.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Second Circuit should be AFFIRMED.

Respectfully submitted,

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